IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-512

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The government contends that the sentencing judge did not violate 28 U.S.C. 2255 in denying Petitioner's motion without a hearing. The government contends Petitioner did not make a *prima facie* showing of the judge's reliance upon the

invalid convictions, and that the records and files of the case fully support the sentencing judge's conclusion. The government further contends that a 28 U.S.C. 2255 hearing is "singularly inappropriate where the question turns upon the state of mind of the judge himself." (Memorandum in Opposition, p. 4.) The government further argues that if the judge admits the unconstitutionally obtained convictions influenced the sentence, a hearing to examine the validity of the convictions might have been required, but not otherwise.

The answer to the government's contentions is obvious. If the prerequisite to a hearing required a showing of the judge's reliance upon invalid

convictions and that showing can only be made if the sentencing judge himself admits his reliance thereon, then a hearing can only be had where the judge makes that admission. If the judge denies, as here, reliance on prior convictions for a severe sentence, no hearing can be had. This amounts to a denial of due process for no inquiry is permitted into the judge's state of mind. Petitioner contends that evidence will objectively show the sentencing judge based his sentence on Petitioner's felony record.

This Court has rejected the right of any government official, even the President of the United States, to subjectively direct another branch of government without objective standards. U.S. v. Nixon, 94 Supreme Court 3090 (1974).

On December 2, 1961, the sentencing judge stated, at the time of sentence:

> "Much of what has been said of Carbo applies to Sica. Sica may not be as widely known, or a criminal of national repute, but has a long record of violence, vice and viciousness, including felony convictions and involvement in various crimes of violence. By any definition or standard, Sica appears to be an habitual criminal. There is no indication that Sica has ever followed any productive or peaceful pursuit of any consequence in all the 50 years of his life. He, too, must be restrained from preying on the community for a substantial period -- somewhat less than that of Carbo because of Carbo's

more important part in the offenses involved in this particular case." (Emphasis added) (Record on Appeal, p. 78.)

This statement was made, at the time of sentencing, after the United States Attorney stated Sica had been convicted of three felonies.

The record reflects that all three prior felony convictions were unconstitutionally obtained in that Sica was not represented by counsel, nor did he had the advice of counsel.

(a) The first of such alleged prior convictions was May 13, 1930, in New Mexico. (See p. 75, Record on Appeal, Exhibit p. 117.)

(b) The second alleged prior felony conviction involved the charge of Larceny, in New Jersey, on

October 11, 1928. (See p. 76 Record on Appeal, Exhibit p. 109.)

(c) The third alleged prior felony conviction involved the charge of Robbery on April 7, 1932, in the State of New Jersey. (See p. 77, Record on Appeal, Exhibits p. 98.)

Yet the government dismisses Sica's contention that Judge Boldt "relied upon constitutionally infirm convictions in imposing sentence" by merely concluding it was "explicitly rejected by that judge in his denial of petitioner's motion to vacate sentence." (Government Opposition, p. 2.) Petitioner has requested the record on appeal be certified to this Court to establish the substance of his contention that all three prior felony convictions are constitutionally infirm in answer to

footnote 3, p. 2, Memo in Opposition.

Judge Boldt, 12 years later, in his Order denying the motion without a hearing, states that he "did base Sica's sentence solely on the depravity and viciousness of his conduct as disclosed by the trial record." However, Judge Boldt was not the trial judge; the judge died and Judge Boldt was the sentencing judge.

Petitioner forcefully contends that nowhere can it be found that any judge has the unbridled subjective discretion to foreclose the right to be heard based upon his own state of mind. Minimal due process requires that Petitioner be permitted to introduce evidence allowing him to establish the fact that his sentence was enhanced because prior felony convictions were considered. Petitioner has established that which is sufficient to plead a case as

is required by 28 U.S.C. 2255, as a matter of law.

Additionally, the matter was decided by the Court of Appeals (9th Circuit) without a hearing after Petitioner filed his written motion requesting oral argument, which motion was not acted upon. (Petitioner has requested that the record of the Court of Appeals be certified to this Court.)

It is therefore respectfully submitted that the Petition for a Writ of Certiorari be granted.

Dated: January 29, 1975.

Respectfully submitted,

LAW OFFICES OF HARRISON W. HERTZBERG

By: /s/
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